Supreme Court, U.S.
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No. 92-1920

In The

Supreme Court of the United States

October Term, 1993

KAREN LIVADAS,

Petitioner,

-against-

LLOYD AUBRY, in his official capacity as Labor Commissioner for the State of California,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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EDITOR'S NOTE

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TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Respondent's Refusal To Prosecute State Labor Claims Of Employees Covered By Collective Bargaining Agreements Containing Arbitration Clauses Violates 42 U.S.C. § 1983 6

II. Petitioner's State Law Claim Is Not Pre-empted By Federal Labor Law 13

CONCLUSION 17

TABLE OF CASES AND AUTHORITIES

Page(s)

CASES

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 13, 16

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 10, 16

Golden State Transit Corp. v. City of Los Angeles ("Golden State I"),
475 U.S. 608 (1986) 9, 11, 12

Golden State Transit Corp. v. City of Los Angeles ("Golden State II"),
493 U.S. 103 (1989) 6, 7, 8

Lingle v. Norge Division of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988) 14

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 13, 14, 16

Livadas v. Aubry, 749 F. Supp. 1526 (N.D. Cal. 1990), *rev'd*, 943 F.2d 1140 (9th Cir. 1991) 6, 16

Livadas v. Aubry, 943 F.2d 1140 (9th Cir. 1991) 6, 12

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 11

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 6, 7

NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967) 10

NLRB v. Jones & Laughline Steel Corp., 301 U.S. 1 (1937) 10

STATUTES

Federal

Labor Management Relations Act, 29 U.S.C. § 185(a) 13

National Labor Relatiions Act, 9 U.S.C § 151 *et seq.* 4, 5, 6, 7, 8, 11, 12, 16

42 U.S.C. § 1983 . . . . . 3, 4, 6, 7, 8, 12

State

California Labor Code § 201 (West 1989) 2, 15, 16, 17

California Labor Code § 203 (West 1989) 2, 12, 15, 16

California Labor Code § 229 (West 1989) 3, 16,

INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of AEF include representatives of business, labor and the general public.

It is the belief of AEF that the ability of labor and management to resolve disputes in an atmosphere of equality is vital to the strength of the economy of the United States. Unnecessary government interference upsets this balance and creates a risk of economic strife that weakens the American economy. The judicial process is a critical area for maintaining a free society, and the public interest is best served by a legal structure that permits, to the fullest extent possible, the resolution of disputes between employers and employees by collective bargaining, with a minimum of governmental interference, in the free pursuit of the negotiating process by both sides. AEF is concerned that a determination adverse to the position of the petitioner in this matter will effectively sanction inappropriate governmental interference in the collective bargaining process.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief by AEF on behalf of petitioner.

STATEMENT OF THE CASE

Petitioner was terminated from her job at Safeway Stores in Napa County, California on January 2, 1990. In connection with her employment, she was covered by a collective bargaining agreement between Safeway Stores and her union, the United Food and Commercial Workers, AFL-CIO. Upon receiving notice of her termination, petitioner requested that her employer make payment of her earned and unpaid wages. Section 201 of the California Labor Code requires all employers to remit unpaid wages to discharged employees immediately upon termination. Instead of paying such wages on termination, however, petitioner's employer mailed her a check in the amount of her unpaid wages, which she received on January 5, 1990. Apparently, there is no dispute that the amount of this check did, in fact, represent all unpaid wages owed to petitioner.

Petitioner thereafter complained to the California Division of Labor Standard Enforcement (the "DLSE") that, pursuant to Section 203 of the California Labor Code,[1] her employer should be penalized for its failure to have given to her all outstanding wages on the date of

[1] That statute provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Section[] 201 . . ., any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid." Cal. Lab. Code § 203 (West 1989).

her termination. However, the DLSE refused to process petitioner's claim for a penalty. Citing Section 229 of the California Labor Code,[2] the DLSE contended that its prosecution of petitioner's claim would necessitate an "application" of a collective bargaining agreement containing an arbitration clause and that petitioner's claim was, as a result, pre-empted by federal labor laws.

Petitioner thereafter filed a complaint against respondent, in his capacity as Labor Commissioner of the State of California (and head of the DLSE), seeking injunctive and declaratory relief as well as money damages, under 42 U.S.C § 1983, on the ground that respondent's enforcement of Section 229 of the California Labor Code effectively deprives employees such as petitioner, who are covered by collective bargaining agreements containing arbitration clauses, from access to the investigatory, prosecutorial and remedial resources afforded under the California Labor

[2] That statute provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

Cal. Lab. Code § 229 (West 1989).

Code. The gravamen of the complaint is that the DLSE's refusal to prosecute petitioner's claim against her employer interferes with her rights under the National Labor Relations Act (the "NLRA"), 29 U.S.C § 151 *et seq.*, placing employees such as petitioner at a disadvantage as a result of their being members of a union that has negotiated a collective bargaining agreement and denying them access to a governmental service based upon their union membership.

SUMMARY OF ARGUMENT

Section 7 of the NLRA provides employees with a federally protected right to uninhibited, unconditional participation in the collective bargaining process. Respondent undermines that right by a policy of refusing to prosecute wage-and-hour claims of employees who are covered by collective bargaining agreements containing arbitration clauses. Invariably, union members are covered by collective bargaining agreements that contain arbitration clauses. As a result, respondent's policy denies union members of a valuable governmental service simply on the basis that they are unionized. On that basis, respondent's enforcement of the policy violates 42 U.S.C. § 1983.

Furthermore, because petitioner's state law claim against her employer does not involve the interpretation of a collective bargaining agreement, respondent's policy is not mandated by federal pre-emption principles.

ARGUMENT

Petitioner seeks to enforce her federally protected right to participate in her union's collective bargaining process without being forced to forfeit a right that she would otherwise possess under state law. The essential issue in this appeal is whether, solely on the basis of petitioner's coverage under a collective bargaining agreement containing an arbitration clause, the DLSE could refuse to afford benefits provided by state law to all employees.

Ironically, both sides' in this action purport to be taking positions in furtherance of the policies underlying the NLRA. Petitioner maintains that, by implementing a policy of refusing to prosecute state law claims of employees covered by collective bargaining agreements containing arbitration clauses, respondent and the DLSE discriminate against union members and interfere with their federally protected right to participate in their unions' collective bargaining activities. Respondent argues that the DLSE's position reflects a pre-emption of state law claims such as that asserted by petitioner in favor of federal guidelines for collective bargaining and arbitration of labor disputes.

I. Respondent's Refusal To Prosecute State Labor Claims Of Employees Covered By Collective Bargaining Agreements Containing Arbitration Clauses Violates 42 U.S.C. § 1983

Both petitioner and respondent agree that the DLSE provides certain valuable protections and benefits to all California employees except those covered by the provisions of collective bargaining agreements containing arbitration clauses. Based upon this inequality, both of the lower courts concurred that respondent's refusal to prosecute petitioner's claim violated 42 U.S.C. § 1983 by impairing petitioner's right, under Section 7 of the NLRA, 29 U.S.C. § 157, to participate in a labor union and in the collective bargaining process without undue governmental interference. *See Livadas v. Aubry*, 943 F.2d 1140, 1142-43 (9th Cir. 1991); *Livadas v. Aubry*, 749 F. Supp. 1526, 1533-35 (N.D. Cal. 1990).

These holdings are consistent with the two-step approach to determine liability under 42 U.S.C. § 1983 prescribed by this Court in *Golden State Transit Corp. v. City of Los Angeles ("Golden State II")*, 493 U.S. 103 (1989), and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). The first step involves inquiry concerning whether there was a violation of a federal right. *Golden State II*, 493 U.S. at 106. To make this determination, the Court asked "whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.'" *Id.* (citations omitted). There must also be a determination whether "the provision in question was 'inten[ded] to benefit' the putative plaintiff." *Id.* (citations omitted).

Upon a finding that a federal right has legitimately been invoked, the second step prescribed in *Golden State II* and *Middlesex County* involves a determination whether Congress "'specifically foreclosed a remedy under § 1983' . . . by providing a 'comprehensive enforcement mechanism for protection of a federal right.'" *Golden State II*, 493 U.S. at 106 (citations omitted). In *Golden State II*, involving facts analogous to those at bar, the Court definitively ruled that there has been no such foreclosing of a § 1983 remedy:

> Although the National Labor Relations Board . . . has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct protected by the NLRA against governmental interference. There is thus no comprehensive enforcement scheme for preventing state interference with federally protected rights that would foreclose the § 1983 remedy.

Id. at 449-50 (footnote omitted).

All that remains is whether respondent's policy of excluding from the DLSE's protection employees covered by collective bargaining agreements containing arbitration clauses constituted impairment of a federal right. It is respectively submitted that this issue, too, should be resolved in petitioner's favor for the same reason that a finding was made on behalf of petitioner in *Golden State II*:

> We agree with petitioner [Golden State Cab Co.] that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983.

Id. at 109. "We have held, based on the language, structure, and history of the NLRA, that the Act protects certain rights of labor and management against governmental interference." *Id.* at 111.

Although, to the parties, the stakes in this action are relatively small, the prospective impact of the Ninth Circuit Court of Appeals' decision, which holds that the DLSE properly refused to prosecute petitioner's claim, is huge. The exclusion of unionized workers from state worker protection laws could easily disrupt the "balance of power designed by Congress" that this Court has referred to in the context of employer-employee relations. *Golden State Transit Corp. v. City of Los*

Angeles ("*Golden State I*"), 475 U.S. 608, 619 (1986). Indeed, a real danger exists that such a disruption of the employer-employee relationship could create a chilling effect on the collective bargaining process. For example, employees considering whether to join a union would first have to weigh the value of lost state labor benefits against the benefit of union membership. This factor places an unfair burden on the union in collective bargaining, inasmuch as employers do not lose any of their comparable state-law rights when they enter collective bargaining. Indeed, the prospect of loss of state labor-law protection that results from the decision of the Ninth Circuit Court of Appeals could be a powerful weapon in the hands of an anti-union employer.[3]

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[3] Such an effect is precisely what Judge Kozinski warned of in his dissent from the decision of the Court below: "It is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: 'Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you.' In a closely fought election, this type of argument might make a difference." *Livadas v. Aubry*, 943 F.2d 1140, 1150 (9th Cir. 1991) (Kozinski, J., dissenting). Such a scenario would be tragically inconsistent with a fundamental tenet of American labor law that the government should foster employee organization and promote equity in bargaining between employers and employees. For example, the findings and policies set forth in the National Labor Relations Act provide, in pertinent part:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from

As this Court stated in *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.

Id. at 180. The Court has also recognized that "both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (citations omitted). Just as an

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> injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151; *see also NLRB v. Jones & Laughline Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

employer comes into negotiations with the authority under state common law to exercise fundamental managerial prerogatives, workers come to collective bargaining with certain legal rights that underpin their bargaining position, such as the protections afforded to all employees by state labor laws. *See id.* Consistent with this balance of power, this Court has consistently ruled that unionized workers should not be penalized for their collective bargaining activity by the loss of minimum state labor standards. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimum standards on nonunion employers."

To see that petitioner, and those like her, are the intended beneficiaries of these principles underlying Section 7 of the NLRA, one need look no further that *Golden State I*. There, the City of Los Angeles refused to renew petitioner's taxi franchise unless petitioner settled a pending strike with its employees. This Court held that petitioner had a federally protected right to deal with or to negotiate a resolution of the strike. Although the taxi franchise was considered a privilege, the Court held that the City could not condition receipt of that privilege "in a way that intrudes into the collective bargaining process." *Golden State I*, 475 U.S. at 619. Similarly, in the action at bar, the only way for petitioner (and those like her in the State of California) to receive the "privilege" of enforcement by the DLSE of

Section 203 of the California Labor Code would be for her to relinquish her federally protected right to participate in her union's collective bargaining process. Accordingly, the DLSE's refusal to prosecute petitioner's state law claim constitutes action "under color of state law" that impairs petitioner's federal statutory rights, in violation of 42 U.S.C. § 1983.

The policy under which respondent claims that the DLSE was acting in refusing to prosecute petitioner's claim against her employer plainly discriminates against citizens on the basis of the exercise of their right to organize, which is protected under the NLRA. The Ninth Circuit's tolerance of such discrimination on the ground that the state labor law, as applied to employees covered by collective bargaining agreements containing arbitration clauses, is pre-empted by federal labor law constitutes a "gutting" of the principles set forth in *Golden State I* and its progeny, *Livadas v. Aubry*, 943 F.2d 1140, 1150 (9th Cir. 1991) (Kozinski, J., dissenting), and should, therefore, be reversed. The concept expressed by the court below asks those who support themselves by their own toil to decide whether they want the protection of state law or of a union. They are entitled to both, and to impose such a choice has to impede the right to organize and collectively bargain in connection with issues not covered by state law.

II. Petitioner's State Law Claim Is Not Pre-empted By Federal Labor Law

Contrary to the argument made by respondent, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1978), does not pre-empt claims such as the one made by petitioner against her employer. In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), this Court applied the pre-emption doctrine to reverse the dismissal of plaintiff's state law claim by the Wisconsin Supreme Court. In particular, the Court found that state rules that, independent of a collective bargaining agreement, "proscribe conduct, or establish rights and obligations, independent of a labor contract," are not pre-empted. *Id.* at 212. The threshold question is whether the state law claim is "inextricably intertwined with," *id.* at 213, and "substantially dependant upon the analysis of terms of" the collective bargaining agreement. *Id.* at 220. Only under those circumstances is the state law pre-empted.

In *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Court further clarified the pre-emption doctrine as follows:

> [If] the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-

> empted and federal labor-law principles--necessarily uniform throughout the nation --must be employed to resolve the dispute.

Id. at 405-06 (footnote omitted). Therefore, if resolution of the claim requires *interpretation* of the terms of a collective bargaining agreement, the state law would properly be deemed pre-empted by federal labor law. *Id.* at 407 n.7. Applying this standard to the facts in *Lingle*, the Court analyzed the elements of plaintiff's state tort claim of retaliatory discharge for filing a workers' compensation claim: "'(1) he was discharged or threatened with discharge and (2) the employers' motive . . . was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights.'" *Id.* at 407 (citations omitted). In defending against such a claim, the employer "must show that it had a nonretaliatory reason for the discharge." *Id.* Based upon this analysis, the Court held, "the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.*

Applying this standard to the case at bar, the Ninth Circuit Court of Appeals can be seen to have made the same error as the Seventh Circuit Court of Appeals was found to have made in *Lingle*.[4] Liability

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[4] *See Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1044-46 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988).

under Section 203 of the California Labor Code is based upon an employer's being shown to have willfully failed to remit earned and unpaid wages of an employee who is discharged or quits, in the manner prescribed in Section 201 (i.e., "immediately" upon termination of employment). If such a showing is made, the employer is to be directed, as a penalty, to pay additional wages, "at the same rate," from the date of termination until the date of final payment of earned and unpaid wages. Cal. Lab. Code 203 (West 1989).

The single justification offered by the DLSE for its policy is that, as applied to employees covered by collective bargaining agreements containing arbitration clauses, Section 203 is pre-empted by federal labor law because determining "the same rate" of wages would necessitate "application" of the collective bargaining agreement.[5] However, that is plainly incorrect. In most cases, and certainly in this case, there is no interpretive issue concerning the "rate" at which the employee was paid prior to termination. At most, the collective bargaining agreement might be referred to for mechanical application, but never "interpreted." As such, the penalty petitioner sought against her employer was nothing more than "tangentially involving a provision of

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[5] In a letter to appellant, the DLSE supported its position, *inter alia*, as follows: "'In order to establish what the "same rate" was [for the purposes of Section 203 of the Labor Code], it is necessary to look to the collective bargaining agreement and "apply" the agreement.' *Livadas v. Aubry*, 943 F.2d 1140, 1144 (9th Cir. 1991).

a collective bargaining agreement." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *See, Livadas v. Aubry*, 749 F. Supp. 1526, 1534-35 (N.D. Cal. 1990), rev'd 943 F.2d 1140 (9th Cir. 1991). Accordingly, allowing petitioner to prosecute her Section 203 claim here would not at all impact upon what this Court has characterized as "the most harmful aspect" of state labor law claims--that is, the avoidance of the arbitration process that the parties to the collective bargaining agreement had agreed upon to resolve contract interpretation disputes. *Lueck*, 471 U.S. at 219.

This case is virtually indistinguishable from *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), where this Court rejected a claim that the NLRA pre-empted a state statute providing a one-time severance benefit to employees in the event of a plant closing. "[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Id.* at 21.

In California, the legislature established certain such labor standards in the form of Section 201 of the Labor Code. Regrettably, in an apparent attempt to anticipate federal pre-emption principles, the legislature also enacted Section 229 of the Labor Code. However, federal pre-emption operates whether states recognize it or not. As this Court held in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988):

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. . . . In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted.

Id. at 413 n.12. Here, petitioner relies on no provision of the state labor laws that offends federal law. Instead, federal law is compromised by the DLSE's exclusion of unionized workers from state labor laws it is supposed to enforce equally for all employees.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be reversed, and respondent should be directed to enforce Sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's employment being subject to a collective bargaining agreement having an arbitration clause. An employee's statutory right to have the State, under its police powers, assure the immediate payment of wages upon the termination of employment should not be denied as a result of membership in a union. It is not equal enforcement that is offensive to federal law,

it is the denial of equal enforcement that is prohibited by federal law.

Respectfully submitted,

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